

U.S. DEPARTMENT OF JUSTICE
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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

Civil Action No. 1:08-CV-04

John S. Pangelinan,
Plaintiff,
v.

David A. Wiseman, et al.,
Defendants.

**Notice of Motion and Motion to Dismiss
Without Leave to Amend filed on behalf of
the Individual Federal Defendants**

Date: April 24, 2008
Time: 10:00 A.M.
Judge: Honorable Frances M. Tydingco-Gatewood

Notice of Motion

PLEASE TAKE NOTICE that on April 24, 2008, at 10:00 A.M., or as soon thereafter as counsel may be heard, the individually named federal defendants, Alex R. Munson, Chief Judge for the U.S. District Court for the Northern Mariana Islands; David A. Wiseman, Designated Judge of the U.S. District Court for the N.M.I.; Craig Moore, Assistant U.S. Attorney for the District of Guam and the N.M.I.; Margarita D.L.G. Wonenberg and Melinda N. Brunson, Federal Probation Officers; Joseph Auther, Special Agent of the Federal Bureau of Investigation; and Donald Hall and Wolf Calvert, Deputy U.S. Marshals; by and through their undersigned counsel, will bring on for hearing their Motion to Dismiss Without Leave to Amend, before the Honorable Frances M. Tydingco-Gatewood, in the U.S. District Court, Saipan, MP, or at whatever other location is designated by this Court.

Motion to Dismiss Without Leave to Amend

NOW COMES the federal defendants, through counsel, and respectfully move the Court to dismiss plaintiff's Complaint without leave to amend, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion is based upon the present record, and accepts for purposes of this motion only that all well-plead material facts will be treated as true and construed in favor of the non-moving party. Plaintiff's claims are nonetheless legally insufficient, and are subject to dismissal without leave to amend on the following grounds.

First, the Complaint refers to factual allegations that pre-date January 28, 2006, and therefore to the extent that plaintiff's claims depend upon those allegations, they are time barred and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Second, any remaining First Amendment retaliation claims are not viable because, as the record in the underlying criminal case reveals, plaintiff's criminal prosecution was supported by probable cause; therefore plaintiff's retaliation claims are subject to dismissal in accordance with Fed. R. Civ. P. 12(b)(6). Third, the Complaint should also be dismissed under Fed. R. Civ. P. 12(b)(1) for want of subject matter jurisdiction because the plaintiff cannot demonstrate a favorable termination of his underlying criminal conviction. Fourth, plaintiff cannot in any event maintain a claim against the judicial defendants or the federal prosecutor because the functions they performed relative to the plaintiff are protected by absolute immunity; therefore the claims against these defendants must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Fifth, the claims against the remaining federal defendants are similarly subject to dismissal in accordance with Fed. R. Civ. P. 12(b)(6) because these defendants are also shielded from plaintiff's claims by absolute and/or qualified immunity. And sixth, plaintiff has currently failed to effect proper service of process on the federal defendants because to date the U.S. Attorney General has not been served. *See* Fed. R. Civ. P. 4(m), 12(b)(2), 12(b)(4) and 12(b)(5). In addition, because the individual federal defendants' moving papers will establish that they are entitled to official immunity from the plaintiff's claims, the Complaint, at least as to them, should be dismissed without leave to amend.

In support of this motion, the federal defendants rely upon the entire record in this

1 cause and invite this Court to take judicial notice of its records and files in the Civil RICO
 2 case in which judgment was entered against the plaintiff, *Angelito Trinidad, et al. v. John S.*
 3 *Pangelinan, et al.*, No. 97-0073 (D. N.M.I.), and its related appeals, 32 Fed. Appx. 357
 4 (C.A.9 (N.M.I.)), Nos. 00-15697, 00-15705, 00-16630, 01-16622, and 54 Fed. Appx. 470
 5 (C.A.9 (N.M.I.)), No. 02-16013, *cert. denied*, 538 U.S. 1064 (2003); the first damages
 6 action filed against Judge Munson, among others, by plaintiff, *Pangelinan v. Munson, et al.*,
 7 D.C. No. CV-02-0025 (D. N.M.I.), and its related appeal, 54 Fed. Appx. 472 (C.A.9
 8 (N.M.I.)), No. 02-16884; and the second damages action filed against Judge Munson and
 9 others, by the plaintiff, *Pangelinan v. Munson, et al.*, D.C. No. 1:04-CV-0010 (D. N.M.I.).

10 In further support of this motion, the federal defendants rely upon their supporting
 11 Memorandum of Law, which is being filed concurrently with this combined Notice of
 12 Motion and Motion to Dismiss (pursuant to Fed. R. Civ. P 12(b)) Without Leave to Amend.

13 Respectfully submitted,

14 JEFFREY S. BUCHOLTZ
 15 Acting Assistant Attorney General
 16 Civil Division

17 /s/ C. Salvatore D'Alessio, Jr.
 18 C. SALVATORE D'ALESSIO, JR.
 19 Senior Trial Attorney, Torts Branch

20 /s/ Virginia G. Lago
 21 VIRGINIA G. LAGO
 22 Attorney Advisor, Constitutional Torts Staff

23 Attorneys for the federal defendants, Alex R.
 24 Munson, David A. Wiseman, Craig Moore,
 25 Margarita D.L.G. Wonenberg, Melinda Brunson,
 26 Joseph Auther, Donald Hall and Wolf Calvert

27 **Certification of Service**

28 I certify that on March 26, 2008, the Individual Federal Defendants' *Notice of Motion and*
 29 *Motion to Dismiss the Complaint without Leave to Amend* was filed electronically. Notice
 30 of this filing will be sent by e-mail to all parties registered to receive electronic filing by
 31 operation of the court's electronic filing system. Parties not indicated to have been
 32 electronically served on the Notice of Electronic Filing will be served with a paper copy of
 33 this filing via regular first class U.S. mail, postage prepaid. Parties may also access this
 34 filing through the court's Case Management (CM) / Electronic Case Filing (ECF) system.

Signed: C. Salvatore D'Alessio, Jr.